Supreme Court, U.S.
FILED
APR 16 1997
OFFICE OF THE CLERK

No. 96-1211

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE CITY OF FLINT, MICHIGAN,

Petitioner,

v.

CHARLES MIDDLETON; W. OSMUND KELLY, III; BRIAN SEPANAK; BRUCE SEPANAK; STEPHEN HILL; GREGORY DOERR, BARRY SAUNDERS; ROBERT LOREY; MAYNARD NEWMAN; JAMES McCLELLAN; and THOMAS HILGENDORF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In accordance with Supreme Court Rule 15.6, Petitioner the City of Flint ("City") respectfully submits this Reply Brief to address certain assertions in Respondents' Brief in Opposition. The City also requests that the Court disregard any factual assertions made by Respondents which are not supported by the record.

FACTUAL BACKGROUND

Respondents open with the assertion that the City rejected the use of less intrusive affirmative action measures in favor of a "quick fix quota." Resp. Brief, p. 1. This assertion is both inaccurate and misleading. Less intrusive measures had been undertaken under the pressure of litigation during the mid-1970's, including a 1:4 promotional remedy; however, after about ten years, those measures had failed to eradicate the effects of the undisputed prior racial discrimination in the Flint Police Department. Chief White's testimony before the Human Relations Commission (HRC) is simply undisputed that between 1977 and 1982 none of the fifteen promotions to sergeant were minorities and, if no remedial action was taken in 1984, the next twenty-one promotions to sergeant from the existing list would all have been white officers. See Petition, pp. 3-4 and App. 85a.

Respondents argue that the factual predicate for the City's motion for summary judgment "was a proposed stipulation of facts submitted to the court by the City's counsel." Resp. Brief, p. 1. The record is clear that there was no stipulation of facts. Rather, unable to secure a stipulation, counsel for the City submitted a list of events and documents upon which the City would rely. R. App. 5a-11a. Identification of events and documents on which the City would rely for purposes of the motion for summary judgment is a far cry from a stipulation as to the relevant underlying facts. Further, this case is not one where summary judgment was reversed based on the testimony or analysis of the competing expert, but one where the Sixth Circuit raised new objections and challenges to the City's evidence.

Respondents assert that the 1:1 Plan was "the product of racial politics." Resp. Brief, p. 5. However, in contrast with the majority-black city council in *Croson*, the Flint City Council which adopted the Plan was not controlled by a black majority and did not act merely upon a history of "societal discrimination." *City of Richmond v. Croson*, 488 U.S. 469 (1989). Rather, the Flint City Council acted only after making specific findings that the effects of past racial discrimination by the Police Department itself continued to exist. In fact, the City Council did not adopt the more accelerated 65/35 ratio which had been recommended by the City's EEO officer. App. 94a and 98a. Evidence that the newly-elected black mayor felt strongly that the effects of past discrimination should be rectified does not mean affirmative action was not warranted, nor does it negate the evidence that there were lingering effects of prior discrimination in the Department.

ARGUMENT

I. THE SIXTH CIRCUIT'S APPLICATION OF THE STRICT SCRUTINY STANDARD WAS FATAL IN FACT.

Respondents answer on a "point-by-point" basis and, in doing so, avoid addressing the inescapable conclusion that the Sixth Circuit's review was conducted with fatally strict scrutiny. Not only is this "fatal-in-fact" scrutiny demonstrated by the examples discussed in the Petition, pp. 7-11, but also by the improper shifting of the burden of proof to the City, Petition, pp. 11-13, and by the Sixth Circuit's departure from this Court's precedent in rejecting the City's statistical evidence, Petition, pp. 13-18.

While Respondents attempt to minimize the importance of the Sixth Circuit's direct factual comparison between this case and the facts in *Paradise*, the significance of the Sixth Circuit's analysis and conclusions is inescapable. Petition, pp. 8-9. *United States v. Paradise*, 480 U.S. 149 (1987). Moreover, while Respondents state that *Paradise* was the only Supreme Court decision where a quota of this magnitude was upheld, the Respondents overlook this Court's decision in

United Steelworkers v. Weber, 443 U.S. 193 (1979), which upheld a collectively-bargained 1:1 quota.

Respondents attempt to side-step the Sixth Circuit's handling of the prior judicial decisions involving discrimination in the Flint Police Department by arguing that the Sixth Circuit did not expressly hold that prior judicial findings of discrimination were required. However, there can be no doubt that the Sixth Circuit relied on evidence that a 1:1 promotional remedy was not ordered in 1977 to conclude that such a remedy could not be justified in 1984 as a matter of law.

Finally, Respondents concede that the Sixth Circuit concluded that the impact of the promotional remedy on non-minorities was severe as a matter of law. The Sixth Circuit's resolution of this issue is inconsistent with this Court's holdings. Petition, pp. 10-11. Respondents suggest that it was proper because that finding was based on undisputed facts. Yet the Sixth Circuit reached its conclusion without regard to the undisputed evidence in the record that, as part of the Plan, the City increased the number of sergeant positions and significantly increased the compensation to police officers. App. 231a. The error is poignantly highlighted by the fact that the Sixth Circuit specifically remanded for a determination of "whether any of the plaintiffs were actually injured by the application of the plan". App. 38a.

II. THE SIXTH CIRCUIT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE CITY TO PROVE THAT ITS AFFIRMATIVE ACTION PLAN WAS CONSTITUTIONAL.

Respondents misapprehend both the issues and the law, suggesting that they are relieved of any burden of proof when the Plan is examined under strict scrutiny. The Sixth Circuit's placement of the burden of proof is contrary to this Court's precedent and conflicts with the decisions of other circuits. Petition, pp. 11-13. Respondents do not address this Court's pronouncements in *Wygant v. Jackson Bd. Of Ed.*, 476 U.S. 267, 277-278 (1986), regarding the proper burden of proof but, instead, rely on a district court opinion in a case involving a

voter's equal protection challenge to a redistricting plan. *Johnson v. Mortham*, 915 F. Supp. 1574 (N.D. Fla. 1996). Respondents' attempt to distinguish the decisions of the other circuits is also futile. Resp. Brief, n. 10. See Petition, p. 12, n. 5.

Respondents also assert that the City's suggested analysis is incorrect because it is used in Title VII litigation, not Fourteenth Amendment litigation. However, not only do the cases relied upon by the City involve equal protection challenges to affirmative action, Petition, pp. 11-13, but Justice O'Connor has expressed the view that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Johnson v. Santa Clara County*, 480 U.S. 616, 649 (1987). The City produced evidence of a gross statistical disparity (as well as strong anecdotal evidence), which, consistent with *Croson*, satisfied the City's burden of producing evidence to support an inference of discrimination.

Finally, Respondents state that they "produced evidence and raised arguments to overcome the justification advanced by the City". Resp. Brief, p. 12. To the contrary, it was not Respondents' evidence or arguments that the Sixth Circuit relied upon in invalidating the Plan *ab initio*, but its own challenges to the City's evidence made without any evidentiary support in the record. Nor does the Sixth Circuit's rejection of the evidence have a basis in appropriate statistical analysis. In the opinion of a leading statistical expert, David Peterson, Ph.D., the City's expert, Dr. Bendick, not only asked the appropriate question for this inquiry, but also concluded that his methods were reasonable and "reflect the thought and craftmanship one would expect of a good economic analyst." Reply App. 7a.

The Sixth Circuit improperly shifted the burden to the City to prove the Plan was constitutional and, having raised its own challenges to the City's evidence, declared the Plan unconstitutional *ab initio* as a matter of law.

III. THE SIXTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENT IN REJECTING THE CITY'S STATISTICAL EVIDENCE.

Unable to defend the Sixth Circuit's departure from the holding in *Paradise* (that the pool of previously-hired officers was not the relevant statistical pool because discrimination at the entry level precluded blacks from competing for promotion), Respondents suggest that the City is misstating the Sixth Circuit's holding. App. 25a. However, it is Respondents who miss the point. The crux of the issue is not whether sergeants had actually been hired from any other pool than previously-hired officers, but whether the pool of previously-hired police officers was affected by discrimination in hiring. Respondents' expert, Harry Frank, Ph.D., admitted that he simply did not consider this question, App. 214a, as Dr. Peterson aptly noted, Reply App. 3a.

The City's expert, Marc Bendick, Ph.D., examined the pool of persons qualified to be an entry-level police officer, a position which does not require any "special skills", to determine how many police officers would have been minority absent discrimination in hiring. In contrast to *Croson*, the qualified labor pool identified in this case was the proper relevant statistical pool for entry-level police officers.[1] This conclusion is confirmed by Dr. Peterson, Reply App. 1a-7a, who supports the methodology of Dr. Bendick and addresses some of the Sixth Circuit's unwarranted criticisms based upon unsound assertions.

Respondents try to narrowly read the Sixth Circuit's decision departing from *Croson*. However, the Sixth Circuit broadly and expressly concluded that an affirmative action plan is "constitutionally unsupportable" when it is derived from general proportions, "even with whatever 'adjustments' the

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[1] Concerns about assumptions and factors which the Sixth Circuit suggested might affect the validity of the analysis, were not raised by Respondents or Respondents' expert, and the record was devoid of evidence from which one could determine whether the assumptions were valid or whether consideration of such factors would actually affect the analysis.

experts, litigants, or courts may think appropriate." App. 25a.[2] This holding is a clear departure from this Court's teachings that a gross statistical disparity can make a *prima facie* case of discrimination and establish a strong basis in evidence to support affirmative action.

IV. THE SIXTH CIRCUIT FAILED TO CONFINE ITS REVIEW TO WHETHER THE RESPONDENTS HAD RAISED A GENUINE ISSUE OF MATERIAL FACT WHICH REQUIRED THAT THE CITY'S MOTION BE DENIED.

To deny the existence of fact issues, Respondents rely heavily upon their assertion that there was a stipulation regarding the facts. As discussed above, the lists of events and documents upon which the City relied for purposes of the motion did not include or constitute a stipulation as to the relevant facts.

More importantly, regardless of whether there was a stipulation, Respondents do not dispute that the Sixth Circuit's challenges to the accuracy and validity of the City's statistical evidence were unsubstantiated by any evidence in the record. In the absence of such evidence, the Sixth Circuit's reversal of summary judgment was a clear departure from the proper standard of review. *Peightal v. Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994).

At best, the Sixth Circuit's attempt at impeachment of the statistical evidence raised factual questions about which there was simply no evidence in the record. If these challenges had been raised at the summary judgment stage, the City would have taken the opportunity to address them and offer additional evidence; such as the opinion of Dr. Peterson, to support the City's statistical evidence. Reply App. 1a-7a. At most, the Sixth Circuit's challenges should have resulted in remand for further proceedings, not resolution as a matter of law. *Concrete Works of Colorado v. City and County of*

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[2]The Sixth Circuit also overgeneralizes from its observations that persons whose origin was the Indian continent are over represented among hotel owners. App. 24a-25a.

Denver, 36 F.3d 1513 (10th Cir 1994), *reh. den., cert. den.*, 115 S.Ct. 1315 (1995).[3]

V. THE SIXTH CIRCUIT UNJUSTLY APPLIED AN IMPROPERLY HEIGHTENED SCRUTINY RETROACTIVELY TO AN AFFIRMATIVE ACTION PROGRAM ADOPTED IN CONFORMITY WITH EXISTING PRECEDENT.

Respondents do not dispute that, at its adoption, the Plan conformed with existing Sixth Circuit precedent. They concede, as they must, that the Plan mirrored the affirmative action plans for the police department of the City of Detroit, repeatedly approved in Sixth Circuit decisions. *Bratton v. City of Detroit*, 704 F.2d 878, *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. den.*, 464 U.S. 1040 (1984), *DPOA v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. den.* 452 U.S. 938 (1981).

Instead, Respondents first confuse and misstate the City's contention that it was inequitable and unjust for the Sixth Circuit to apply the 1989 *Croson* standard retroactively to City conduct in 1984 in conformity with then Sixth Circuit precedent to avoid an affirmative action plan *ab initio*. Respondents state that the City asserts a defense of "good faith immunity" in order to contend waiver for failure to plead such immunity as an affirmative defense or as an issue in dispositive motions. However, as the majority and concurring opinions in *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1751 and 1753 (1995) recognized, good faith immunity is not the only instance where reliance may justify a decision not to apply the *Croson* standard retroactively. Moreover, the good faith advanced by the City to oppose retrospective relief is not the good faith immunity of public officials who act in reliance on clearly established law, since there is no individual defendant, *Owen v. City of Independence, Mo.*, 445 U.S. 622

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[3] Respondents do not attempt to defend the Sixth Circuit's reliance on 1992 statistics to undermine the basis for the City's adoption of the Plan in 1984. Petition, pp. 19-20. Nor do Respondents attempt to explain the Sixth Circuit's fundamental inconsistencies between its conclusion that "deeper analysis" of the statistical evidence was necessary and its conclusion that the City did not have a compelling state interest as a matter of law. App. 22a and 28a.

(1980). Rather, the City argues that its reliance on existing precedent approving the very same plan and on the approval of its plan by the state civil rights department (an approval permitted but not required under the state statute) should militate against a finding of unconstitutionality *ab initio*.

More troubling is Respondents' cavalier belief that the City should have been able to predict that this Court would adopt the strict scrutiny standard in 1989, even though as of 1984 the Sixth Circuit had adopted the "reasonableness" standard championed by Justice Marshall and other Justices of this Court. Even after its plurality decision in *Wygant*, which Respondents claim reversed the reasonableness standard previously followed in the Sixth Circuit, this Court noted that it had "yet to reach consensus on the appropriate constitutional analysis." *Paradise*, 107 S. Ct. at 1064. Not until *Croson*, a case clearly distinguishable on its facts in light of Richmond's reliance on mere assertions of past discrimination and its failure to analyze the relevant qualified applicant pool, did this Court field a majority for an appropriate standard for benign classification cases in the minority set-aside context.

Next, Respondents suggest that the City should have realized from a minority set aside case in the Sixth Circuit in 1987 that the strict scrutiny standard would be applicable. Respondents now assert, to avoid certiorari, that there were no promotions before 1987. However, that claim differs from the claims of earlier failures to promote made by Respondents below. Initially, the City reiterates that it won summary judgment under the *Croson* standard, and that the Sixth Circuit impermissibly heightened the *Croson* standard to invalidate the Plan *ab initio*. Furthermore, the case upon which Respondents rely, *Michigan Road Builders Ass'n., Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), an inapposite minority set aside case, was not decided until November 25, 1987, with rehearing denied February 23, 1988; its certiorari petition was apparently held pending the outcome in *Croson* in 1989. *See*, 489 U.S. 1061 (1989). In a vigorous dissent in *Michigan Road Builders*, then Chief Judge Lively criticized the majority opinion for its inappropriate scrutiny of the findings made by the State of Michigan in adopting its set aside program. Respondents also fail to mention that, in late 1986, the Sixth Circuit continued

to cite with approval and to rely upon *Weber* in promotion cases, *see, e.g., Youngblood v. Dalzell,* 804 F.2d 360 (6th Cir. 1986), and throughout 1985-1991 approved *sub silentio* the use of dual lists in an affirmative action plan. *Jansen v. City of Cincinnati,* 977 F.2d 238, 243 (6th Cir. 1992). The Sixth Circuit also noted that in *Wygant* and *Johnson* the burden of proving that their constitutional rights had been violated fell on non-minority challengers to an affirmative action plan. *Id.* Moreover, following *Michigan Road Builders,* minority set aside cases were distinguished when voluntary or consent decree affirmative action programs were evaluated. *Aiken v. City of Memphis,* 37 F.3d 1155, 1172-1175 (6th Cir. 1994) (dissenting opinion). Even in the *Arrow Office Supply* case cited by Respondents, the district court remarked that this Court considered, as late as *Croson* that a more relaxed type of scrutiny might be appropriate "when 'the white majority' places a burden on itself"; however, that standard could not be hypothesized where the majority of Richmond's City Council members were African-American. Respondents blatantly assert that "racial politics" like those at play in *Croson* compelled adoption of the Plan, but never deny that the Flint City Council was controlled by a Caucasian majority; moreover, the thin evidence they cite of the Mayor's support of affirmative action does not demonstrate that he or African-Americans controlled the adoption of the Plan. Clearly, even under Sixth Circuit precedent in the late 1980's and early 1990's, a different standard of scrutiny was applied to voluntary affirmative action programs than the strict scrutiny applied by the Sixth Circuit here.

Finally, Respondents contend that this Court should not consider whether retrospective relief is appropriate where a new rule of law was not fashioned in this case. The City reiterates that the Sixth Circuit's use of an improperly heightened standard of scrutiny (particularly where it applied 1992 statistics to the 1984 Plan) and its failure to simply terminate the Plan, as it did the City of Detroit's affirmative action plan in 1993, constituted a new rule of law as to voluntarily adopted affirmative action plans. *DPOA v. Young,* 989 F.2d 225 (6th Cir. 1993), *on rem.* 850 F. Supp. 27 (E.D. Mich. 1994). Where an appellate court has applied a standard different from the standard in place when the government

actors acted in adopting an affirmative action plan, then relief, if any, should run only from the date of the new standard, and not from the date of the adoption of the Plan. To rule otherwise submits the City of liability for conduct legal at the time the Plan was adopted and to millions of dollars in exposure for the entire period of time in which the Plan operated. Respondents assert that such exposure is limited where the Plan ended in "1993," but fail to remark that promotions before 1987 are in issue and that the Sixth Circuit remanded for proofs on whether a *de facto* Plan continued after 1992. This case thus demonstrates the very concern posed by those justices uncomfortable with the *Harper* rule, *Harper v. Virginia Dpt. Of Taxation,* 113 S.Ct. 2510 (1993), and presents an appropriate vehicle for its revisiting the *Harper* rule.

CONCLUSION

For all of the above reasons, this Court should grant this Petition for Certiorari, and/or vacate the decision of the Sixth Circuit, and either (a) reinstate the District Court's decision, or (b) remand to the District Court for reconsideration on a re-opened record of whether, under the changed legal standard, Respondents can prove the Plan unconstitutional and/or at what point in time any retroactive remedy should arise.

Respectfully submitted,

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AFFIDAVIT OF DAVID W. PETERSON

DAVID W. PETERSON, being duly sworn, deposes and says:

1. I am president of PRI Associates, Incorporated, a company whose chief activity is providing statistical litigation support. I am also recently retired as Adjunct Professor in the Institute of Statistics and Decision Sciences at Duke University, Durham, North Carolina, where for more than twenty years I taught courses in the theory and application of statistics. I am co-author of a book entitled *Use of Statistics in Equal Employment Opportunity Litigation*, the guest editor of a special issue of the journal *Law and Contemporary Problems* devoted to statistical inference in litigation, and the contributor of a chapter to each of two other books on the use of statistics in litigation. I have testified in federal district courts around the nation as an expert statistical witness in more than thirty cases and worked with legal teams as a statistical expert in more than two hundred different cases. I have testified for and advised plaintiffs as well as defendants.

2. My firm is retained in this case to comment on the statistical work done by Dr. Marc Bendick and Dr. Harry Frank, experts at trial for the defendant and the plaintiffs, respectively, and further to comment on the Sixth Circuit Court of Appeals' interpretation of their work.

3. As a result of my review of the work of Drs. Bendick and Frank, and of the Sixth Circuit's opinion, I conclude

a. That Dr. Bendick demonstrated convincingly that, as of 1984 and for some years thereafter, minorities held a smaller number of positions at each police rank than they probably would have held had the City never at any time discriminated in any way in its employment practices; and

b. That the City's 1:1 promotion of minorities to sergeant achieved appropriate minority representation in the rank of sergeant.

4. The materials on which I rely for these conclusions are

a. Dr. Bendick's April 1984 Report entitled "Minority Hiring and Promotion in the Flint Police Department: A Labor Market Analysis";

b. Dr. Bendick's February 1992 Report entitled "The Representation of Minorities at the Rank of Sergeant in the Flint Police Department: An Updated Labor Market Analysis";

c. Dr. Frank's undated but post-1989 Report entitled "Comparison of the Proportions of Black Sergeants and Black Patrol Officers 1980-1989"; and

d. The Sixth Circuit Court of Appeals' opinion in this case, 92 F.3d 396 (6th Cir. 1996).

5. The basis for my opinions is set forth below, following a summary of the works by Drs. Bendick and Frank.

A Synopsis of Dr. Bendick's Work

6. The question Dr. Bendick addresses with his analysis is

> In the absence of discriminatory personnel practices of any kind on the part of the City of Flint, what would the racial composition of the City's various police ranks have been?

He addresses this question as of two different dates: 1984 and the beginning of 1992. Having settled on his answer to the above question, Dr. Bendick then examines the actual racial composition of the City's police officers, and concludes that

a. In 1984, there were fewer minority incumbents in each of the four major-rank groups of police officers than there would have been in the absence of past discriminatory personnel practices; and

b. In 1992, there were fewer minority incumbents in the first two major rank groups of police officers than there would have been in the absence of past discriminatory personnel practices.

A Synopsis of Dr. Frank's Work

6. Dr. Frank, in contrast, compares the racial composition of incumbent sergeants to that of incumbent police officers each year from 1980 through 1989 and finds, at least in the mid-to-late 1980s, that the two compositions are quite similar. Indeed, he notes that the proportion of sergeants who are minority group members exceeds that of police officers in the late 1980s.

Discussion

What is the Question?

7. The initial issue in examining the works of both Dr. Bendick and Dr. Frank is whether either one of them addressed their studies to a question of interest in this litigation. In my view, Dr. Bendick did and Dr. Frank did not.

8. The main question addressed by Dr. Bendick in 1984 was whether, in the absence of any racially discriminatory practices by the City of Flint, either in recruiting, testing, hiring, retaining, promoting or any other aspect of employee management, there would have been more minority police officers incumbent in each of the four major rank groups than in fact were incumbent in 1984. If the answer to this question is affirmative, it is an indication that one or more aspects of the City's personnel practices may have operated to the disadvantage of minorities in achieving jobs at these ranks.

9. Dr. Frank, on the other hand, by comparing the composition of police sergeants to that of the officers in the rank below, examines only the question of whether the promotion of minorities to sergeant is keeping pace with their representation among entry level police officers. It does not address the issue of whether the number of minority police

officers is appropriate, and it likewise avoids the issue of whether, had the City never discriminated, there would have been more minority sergeants.

10. The question before the court is whether the City's practice of promoting minority police officers to sergeant in one-to-one proportion with non-minority promotions from 1984 on is justifiable. Whether it is, as I understand the situation, depends at least in part on whether the City's employment practices have artificially depressed the number of minority police sergeants.

Did Dr. Bendick Answer His Question?

11. Determining the proper racial composition of the City's police sergeants in 1984, involves two steps: first, the estimation of the racial composition of the segment of the labor market from which police officers are or should be hired by the City, and second, an estimation of the number of minority sergeants that would be incumbent had they been racially representative of the labor market from which they were originally hired as police officers.

12. The first of these steps necessarily involves estimation and approximation, because there is no practical way to determine precisely who is interested in and qualified for police officer jobs with the City at each moment in time. The main resource available for this task is data from the various decennial censuses collected by the US Bureau of Census, the source used by Dr. Bendick. These detailed data are published by the Bureau in various summary forms, none of which pertain specifically and exclusively to the pool of people from which the City of Flint might reasonably be expected to draw its police officers on a particular date. Hence, in estimating the racial composition of this pool of people, one must start with a pool that is approximately correct, and then make various adjustments to improve that approximation.

13. Dr. Bendick followed this method by starting with the entire population in the vicinity of the City, and casting out people who were either too old or else too young to qualify as

police officers, those who had either too little or too much education, and those who were not part of the civilian labor force. He also added in a few people to account for the fact that the US census usually undercounts people, especially minorities, and made a further adjustment to account for the tendency of minorities more than non-minorities to seek public sector jobs. The resulting pool of people is, quite plausibly, the pool from which the City might reasonably have been expected to draw its police officers.

14. Of course, the above assertion holds true only for times proximate to the time the census data were collected, *i.e.*, each of the years 1950, 1960, 1970 and 1980. The composition of the residents of Flint changed dramatically during this time from about 10% minority in 1950 to about 45% in 1980. As a result of this change and of the fact that some of the City's police officers as of 1984 had been hired as far back as the late 1950s, a separate labor market composition estimate is needed for each of these census years. To track changes in the labor market composition through intervening and subsequent years, the composition estimates for each of the years 1950, 1960, 1970 and 1980 need to be interpolated or extrapolated. All of this, Dr. Bendick did.[1]

15. The second step in estimating the perfect parity composition of the City's sergeants in 1984 is to group them by their year of hire, and then determine exactly how many in

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[1] In checking through Dr. Bendick's calculations, especially in light of the Circuit Court's remark at 399 that "Dr. Bendick's [1970] statistics differed sharply from those of other statisticians", I found that Dr. Bendick's 1970 minority availability estimate should have been about 30% rather than about 45%. When I use 30% for the 1970 availability percentage but otherwise repeat Dr. Bendick's calculations, I find that the perfect parity number of officers is 75.3 rather than Dr. Bendick's 91: hence, both of our figures are well in excess of the actual number (45) of minority officers. I find that the perfect parity number of sergeants in 1984 was 17.4 rather than Dr. Bendick's 27: hence, once again both of these figures are well in excess of the actual number (8). Thus, while Dr. Bendick may have erred in calculating the 1970 labor market composition, that error would not have affected his conclusions about the under representation of minorities on the police force in 1984.

each group would have been minorities had each year's group been hired in perfect racial parity with the labor market that year. This calculation too, Dr. Bendick did.

16. In sum, I believe that Dr. Bendick's estimate of the proper racial composition of City's police force is the product of careful thought and reasonable approximation. The assertion by the circuit court at 403 that Dr. Bendick has compared the "composition of the [C]ity's police sergeants to the general Flint labor force" is clearly wrong.[2] His comparison is much more refined than that.[3]

17. In an aside, the Sixth Circuit complains (note 8) that "Dr. Bendick's numbers are quite misleading in other ways," pointing out in effect that the racial composition of the officers active in 1992 who were hired in the mid-1970s does not reflect the racial composition of the totality of people hired as police officers in the mid-1970s. While the Sixth Circuit may be numerically correct in its observation, I think it is wholly off-point. I did not detect any intent on the part of Dr. Bendick to either rely upon or hide this point. The racial composition of the totality of people hired as police officers in the mid-1970s has no role in the perfect parity calculation; what is important to the calculation is the number of people hired then who were still active in 1992, and the racial composition of the pool from which they were selected for hire.

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[2] The Sixth Circuit repeats this assertion at 406, saying that the City's expert was "basing his numbers primarily on the percentage of minority members in the general workforce of Flint." This is not true, and the court seems to acknowledge as much in its note 7.

[3] As it happens, once Dr. Bendick's various adjustments have been made, the resulting labor market minority percentage is in every case similar to the representation of minorities in the population as a whole. Nationally in 1980, blacks constituted 11.8% of the US population and 15.4% of the police and detectives, suggesting (i) that blacks to a greater extent than non-blacks seek jobs as police and detectives and therefore that (ii) Dr. Bendick's minority percentage estimates may be a little low. (See Statistical Abstract of the United States, 1986, Tables 27 and 680.)

18. At 407, the Sixth Circuit asserts that Dr. Bendick "assumes without any substantiation whatsoever that minority men and women as a group are exactly as inclined as are non-minority men and women as a group — neither more so nor less so — to seek employment in the police department, and that they are exactly as qualified under non-discriminatory conditions." This is not quite true. That assumption comes only after Dr. Bendick has trimmed the labor market down to people with the age and educational levels likely to make them good candidates for police work. Once again the Sixth Circuit appears to be under the misapprehension that Dr. Bendick's comparisons rely on gross population statistics; that simply is not so.

19. In sum, it is my opinion that the question asked and answered by Dr. Bendick is more relevant to the appropriateness of the City's promotion policy than is the question asked and answered by Dr. Frank. Furthermore, the methods used by Dr. Bendick to obtain his answers are reasonable, and they reflect the thought and craftsmanship one would expect of a good economic analyst.

Further the Affiant saith naught.

By /s/ David W. Peterson
David W. Peterson

NORTH CAROLINA
ORANGE COUNTY

I, Peter R. Skalak, a Notary Public of said County and State do hereby certify that David W. Peterson personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and notarial seal, this the 15th day of April, 1997.

By /s/ Peter R. Skalak
Notary Public
My Commission Expires:
January 16, 2002